



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 26, 2004

Ms. Kathleen Spears
Officer for Public Information
Parkland Health & Hospital System
5201 Harry Hines Boulevard
Dallas, Texas 75235

OR2004-0555

Dear Ms. Spears:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 196330.

The Dallas County Hospital District (the "district"), which you represent, received four separate requests for information regarding RFP 4061-03. In Open Records Letter No. 2003-8458 (2003), this office concluded, among other things, that portions of Computer Sciences Corporation's ("CSC") proposal are excepted from disclosure under section 552.110 of the Government Code. It has since come to our attention that a portion of the submitted information found in CSC's Best and Final Offer ("BAFO") was not ruled on. You now seek a supplemental ruling to Open Records Letter No. 2003-8458 to determine whether the information in CSC's BAFO that was not previously ruled on may be excepted from disclosure pursuant to sections 552.110 and 552.131 of the Government Code. This ruling supplements Open Records Letter No. 2003-8458 that was issued on November 24, 2003.

Section 552.110 of the Government Code protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110. Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. Gov't Code § 552.110(a). A "trade secret" may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs

from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management. Restatement of Torts § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret: (1) the extent to which the information is known outside of [the company's] business; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and to [its] competitors; (5) the amount of effort or money expended by [the company] in developing this information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. Restatement of Torts § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a prima facie case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov’t Code § 552.110(b); *see also Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Upon review of CSC’s original arguments and the submitted information found in CSC’s BAFO, we conclude that sections 4.4-3 through 4.4-23 and 4.7.1(e)-2 through 4.7.1(e)-8 of the BAFO contain confidential trade secrets that are excepted from disclosure under section 552.110(a). We note that you must mark sections 4.4-3 through 4.4-5 of the BAFO in the same manner as Open Records Letter No. 2003-8458 instructed you to mark sections 4.4-3 through 4.4-5 of CSC’s proposal. Sections 4.4-6 through 4.4-23 and 4.7.1(e)-2 through 4.7.1(e)-8 of the BAFO are excepted from disclosure in their entirety.

We now address the pricing information in section 4.6 of the BAFO that was not previously ruled upon. Pricing information contained in section 4.6 of CSC's BAFO may not be withheld under section 552.110(a) because CSC has not shown that the prices are continuously used in their business rather than information as to a single event that is only specific to this RFP. *See* Open Records Decision Nos. 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 (1982) (finding information relating to pricing not excepted under section 552.110 and that pricing proposals are entitled to protection under section 552.104 only during bid submission process), 184 (1978). However, although pricing information contained in section 4.6 of CSC's BAFO cannot be withheld pursuant to section 552.110(a) as noted above, CSC also argues that the information should be withheld under section 552.110(b). Upon review, we find that CSC has adequately demonstrated that the pricing information contained in section 4.6 of their BAFO would cause them substantial competitive harm for purposes of section 552.110(b). Consequently, the submitted pricing information in section 4.6 of the BAFO is excepted from disclosure under section 552.110(b).

In regard to the additional information found in section 4.7.1(b) of the BAFO, we find that CSC has failed to demonstrate that the information constitutes confidential trade secrets under section 552.110(a) and has failed to show that the release of this information would cause them substantial competitive harm under section 552.110(b). Therefore, the information found in section 4.7.1(b) of CSC's BAFO may not be withheld under section 552.110.

In summary, we conclude that sections 4.4-3 through 4.4-23 and 4.7.1(e)-2 through 4.7.1(e)-8 of the BAFO are excepted from disclosure pursuant to section 552.110(a). The pricing information found in section 4.6 of the BAFO is excepted from disclosure under section 552.110(b). The additional information found in section 4.7.1(b) of the BAFO must be released to the requestor. This ruling supplements Open Records Letter No. 2003-8458.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general

have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 196330

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